



Commonwealth of Kentucky
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Subject:

- (1) Who may appoint the President and Chief Executive Officer of the State Fair Board and determine the President and CEO's compensation?
- (2) Who may appoint the Commissioner for the Department of Fish and Wildlife Resources and determine the Commissioner's compensation?
- (3) What role, if any, does the Secretary of the Finance and Administration Cabinet have in approving a contract entered into with the President and CEO of the State Fair Board and the Commissioner of the Department of Fish and Wildlife Resources?

Requested by:

Dr. Ryan Quarles, Commissioner of Agriculture and
Member of the State Fair Board

and

Dr. Karl Clinard, Chairman
Fish and Wildlife Resources Commission

Written by:

Carmine G. Iaccarino, Executive Director
Marc Manley, Assistant Attorney General
Office of Civil & Environmental Law

- Syllabus:*
- (1) Under KRS 247.130, the State Fair Board appoints its President and CEO and sets his or her compensation.
 - (2) Under KRS 150.061, the Department of Fish and Wildlife Resources Commission appoints the Commissioner of Fish and Wildlife and sets his or her compensation.
 - (3) The Finance and Administration Cabinet Secretary has no role in reviewing or approving a contract entered into with the President and CEO of the State Fair Board or the Commissioner of the Department of Fish and Wildlife Resources unless the contract is disapproved by the Government Contract Review Committee of the Legislative Research Commission.

Opinion of the Attorney General

The State Fair is a big deal in Kentucky. So, too, are hunting and fishing. For this reason, the General Assembly has attempted to insulate the agencies and officials who oversee these matters from excessive political influence. This opinion addresses the tensions that exist when a gubernatorial administration attempts to obstruct hiring decisions that Kentucky law vests in the State Fair Board and the Department of Fish and Wildlife Resources Commission.

State Fair Board

Who may appoint the President and Chief Executive Officer (“CEO”) of the State Fair Board and set his or her salary? Commissioner of Agriculture Ryan Quarles, who serves as an ex officio member of the State Fair Board pursuant to KRS 247.090(1)(b), asks these questions. For the reasons that follow, this Office concludes that the State Fair Board has the exclusive ability to hire its President and CEO and set his or her compensation.

KRS 247.090 establishes the State Fair Board and provides for its membership. Six of the State Fair Board’s eighteen members are ex officio, and the remaining twelve are appointed by the Governor according to certain statutory requirements. *See* KRS 247.090(1).

The State Fair Board is required to promote the state and its development by providing facilities for “agricultural and industrial exhibitions, public gatherings, cultural activities, and other functions calculated to advance the educational, physical, and cultural interests of the public.” KRS 247.140(1)(c). As its name

implies, the State Fair Board is also charged with holding the annual State Fair. KRS 247.140(1)(d). To achieve its statutory functions, the State Fair Board is given custody and control of the Kentucky State Fairgrounds and Exposition Center and other properties such as the Kentucky International Convention Center. KRS 247.140(1)(a).

These functions make the State Fair Board different in kind from many government agencies for a simple reason recognized in statute: it is, essentially, a business. The State Fair Board generates approximately \$50 million in revenue annually. In recognition of its important functions and need for continuity, the General Assembly established the State Fair Board as “a body corporate with the usual corporate powers.” KRS 247.100. This “corporate powers” provision is uncommon for a state agency, but reasonable in light of the State Fair Board’s duties.

According to Commissioner Quarles, the State Fair Board’s current President and CEO “has done an exemplary job of managing the properties that the Board oversees.” So good, in fact, that the State Fair Board unanimously voted on April 23, 2020, to extend the contract of its current President and CEO by two years through June 30, 2022. The motion to approve the new contract provides that the President and CEO would continue with the same annual salary and performance incentive terms and conditions as existed for the previous two years.

Despite the State Fair Board’s unanimous vote, Commissioner Quarles states that Finance and Administration Cabinet Secretary Holly McCoy-Johnson “has declined to provide her signature to the contract renewal documentation.” Commissioner Quarles asks whether the State Fair Board has the unilateral authority to hire its President and CEO and what role, if any, the Secretary of the Finance and Administration Cabinet has in the process. The answers are straightforward.

KRS 247.130(1) provides that the State Fair Board “may employ or contract with a president who shall not be one of their number. The president shall be the chief executive officer for the board. The employment or contract of a president shall be on the basis of training, ability, and experience.” Moreover, the State Fair Board “shall determine the term, conditions, and compensation of its president, provided such term does not exceed four (4) years.” KRS 247.130(1).

“[I]f a statute is clear and unambiguous and expresses the legislature’s intent, the statute must be applied as written.” *Hall v. Hospitality Res., Inc.*, 276 S.W.3d 775, 784 (Ky. 2008). The text of KRS 247.130(1) could not be more plain: the State Fair Board appoints its President and CEO and sets his or her term and

compensation. Thus, so far as appointment and compensation are concerned, the State Fair Board is the sole arbiter.¹

Department of Fish and Wildlife Resources

Who may appoint the Commissioner for the Department of Fish and Wildlife Resources? Who determines compensation for the Commissioner? Can an interim commissioner lead the Department? The chairman of the Department of Fish and Wildlife Resources Commission (“Commission”), Dr. Karl Clinard, asks these questions. For the reasons that follow, it is the opinion of this Office that the Commission has the sole authority to appoint the Department’s Commissioner. And it is the Commission that sets his or her compensation.

For context, Dr. Clinard explains that on January 31, 2020, the Commission unanimously voted to renew the current Commissioner’s contract for an additional two years. Immediately thereafter, the Commission executed the renewal contract and submitted it to Tourism, Arts and Heritage Cabinet Secretary Mike Berry for processing. The contract not having received action, Dr. Clinard requested on May 18, 2020, that the contract again be sent to Secretary Berry and that he forward the contract to Finance and Administration Cabinet Secretary McCoy-Johnson for final entry into the state procurement system. To date, Dr. Clinard has not received a response, and the Commissioner’s current contract is set to expire on June 30, 2020.

Under KRS 150.061(1), “[t]he commission shall appoint a commissioner of the Department of Fish and Wildlife Resources, who shall be a person with knowledge of and experience in the requirements for the protection, conservation and restoration of the wildlife resources of the state.” Moreover, KRS 150.061(3) provides that the Commissioner shall execute a bond “[u]pon appointment by the commission[.]” Again, the text of the statute is unambiguous: the Commission appoints the Commissioner of the Department of Fish and Wildlife Resources. *See Revenue Cabinet v. O’Daniel*, 153 S.W.3d 815, 819 (Ky. 2005) (“In other words, we assume that the ‘[General Assembly] meant exactly what it said, and said exactly what it meant.’”).

There is additional support for this conclusion elsewhere in state law. For example, KRS 150.022(2) provides that “[t]he Governor shall appoint the members of the commission subject to confirmation by the Senate.” In this way, the General Assembly has provided for the appointment of the Commission’s members in a manner that is separate and distinct from the method of appointing the

¹ In addition, as a “body corporate” with “corporate powers,” the State Fair Board “shall have the officers described in its bylaws or appointed by the board of directors in accordance with the bylaws.” KRS 271B.8-400(1). KRS 247.130(1) is akin to a “bylaw” of the State Fair Board, and it grants the board members authority to hire the President and CEO, an officer of the corporation.

Commissioner of the Department. By granting the Governor the authority to appoint Commission members, but specifically providing that the Commission appoints the Commissioner, the General Assembly has intentionally prescribed the manner in which the Department's Commissioner is appointed. *See Keene Corp. v. U.S.*, 500 U.S. 200, 208 (1993) ("Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (cleaned up); *Palmer v. Commonwealth*, 3 S.W.3d 763, 764-65 (Ky. App. 1999) (same as applied to the General Assembly).

Chairman Clinard's request implies that the Secretary of the Tourism, Arts and Heritage Cabinet or the Secretary of the Finance and Administration Cabinet is delaying the contract. But neither Secretary has authority to delay or otherwise interfere in a lawful appointment by the Commission. Of course, it is true that the secretary of each cabinet may advise "the governor on the appointment of commissioners and heads of units included in the related cabinet, except for those whose election or selection is otherwise provided by law." KRS 12.270(1)(e). And "[e]ach secretary shall have exclusive control and direction over the administration of the related cabinet programs as required by law." KRS 12.270(4). But here, other provisions of law govern the Commissioner's selection and appointment. KRS 150.061(1).

In fact, KRS 12.270 recognizes a cardinal rule of statutory construction: "between legislation of a broad and general nature on the one hand, and legislation dealing minutely with a specific matter on the other hand—the specific shall prevail over the general." *City of Bowling Green v. Board of Educ. of Bowling Green Independent School Dist.*, 443 S.W.2d 243, 247 (Ky. 1969); *see also Bevin v. Beshear*, 526 S.W.3d 89, 91 (Ky. 2017) (dismissing the case as moot when a newly enacted statute governing the removal of university board members controlled over the more general provisions of KRS 12.028). Here, KRS 12.270(1) provides cabinet secretaries with general authority relating to the appointment of commissioners and agency heads. But KRS 150.061² provides the specific authority for the Commissioner's appointment. And that authority rests with the Commission. *See* KRS 150.061. Therefore, the Secretary of the Tourism, Arts and Heritage Cabinet has no role in advising "the governor on the appointment of" the Commissioner because the selection procedure for that post is "otherwise provided by law."³

² Not only is KRS 150.061 more specific than KRS 12.270, it was also amended later in time. KRS 150.061 was amended in 2010. Ky. Acts ch. 158, § 7. KRS 12.270 was last amended in 1992. Ky. Acts ch. 13, § 3. Therefore, KRS 150.061 is both more recent and more specific than KRS 12.270.

³ As yet further support, the Commissioner of the Department of Fish and Wildlife Resources is exempted from the general personnel laws found in KRS Chapter 18A. *See* KRS 18A.115(2) (providing that nothing in KRS Chapter 18A shall be construed as altering or amending KRS 150.061). Moreover, this Office has previously recognized that it is the Commission's prerogative, not that of a cabinet

Chairman Clinard also asks whether, given the delay caused by one or both of the cabinet secretaries, the Commission may appoint an interim Commissioner if the need arises, such as if the Commissioner's contract is not finalized by its expiration. Again, KRS 150.061(1) is conclusive. The Commission holds the sole authority to appoint a Commissioner, and no distinction is made between an interim, acting, or permanent Commissioner. Therefore, the Commission may appoint an interim Commissioner if the need arises.

The Finance and Administration Cabinet's Limited Role

This Office has also been requested to address the role, if any, of the Secretary of the Finance and Administration Cabinet in reviewing the two employment contracts in light of the roadblocks that have been established since the State Fair Board approved a new contract for its President and CEO in April and the Department of Fish and Wildlife Resources Commission approved a new contract for its Commissioner in January. For the reasons that follow, the answer is that the Finance and Administration Cabinet Secretary has a role in the review of the contracts only if the Legislative Research Commission's Government Contract Review Committee disapproves the contracts.

The Secretary of the Finance and Administration Cabinet serves as the state's "chief purchasing officer." KRS 45A.030(3). In this capacity, the Secretary may adopt administrative regulations that govern the purchase, management, and control of supplies, services, and construction. KRS 45A.035(1). The Secretary must also adopt a manual of procedures to govern procurement, which manual must be adopted as an administrative regulation. KRS 45A.045(2).

Both the State Fair Board President and CEO and the Department of Fish and Wildlife Resources Commissioner serve pursuant to a personal service contract. A personal service contract is "an agreement whereby an individual . . . is to perform certain services requiring professional skill or professional judgment for a specified period of time at a price agreed upon. KRS 45A.690(1)(g). As a general matter, a personal service contract is awarded to the best qualified offeror after a request for proposals has been issued. *See* KRS 45A.695(3), (5). The determination of the "best qualified offeror" is made by the contracting agency, not the Finance and Administration Cabinet. KRS 45A.695(5).

But, a request for proposals is not required in this instance because the officials are hired pursuant to statutes that vest exclusive authority in the relevant board or

secretary, to remove the Commissioner of the Department of Fish and Wildlife Resources. *See* OAG 83-295 (July 21, 1983).

commission. This makes the subject contracts eligible for award by noncompetitive negotiation pursuant to KRS 45A.095. *See* KRS 45A.075(3). A contract may be awarded by noncompetitive negotiation if it qualifies for treatment as a sole source purchase⁴ or if competition is not feasible. *See* KRS 45A.095(2); *see also* 200 KAR 5:309. The personal service contracts for these officials are textbook examples of contracts that may be awarded by noncompetitive negotiation by virtue of the exclusive hiring authority contained in KRS 247.130 and KRS 150.061. In other words, competition does not exist because the State Fair Board has the exclusive right to hire its President and CEO, and the Commission has the exclusive right to hire its Commissioner.

The manual of procedures issued by the Finance and Administration Cabinet Secretary pursuant to KRS 45A.045(2) and incorporated into 200 KAR 5:021 provides that “contractual services where no competition exists” are “exempt by law from competitive bidding and may be purchased *without* prior approval from [the Finance Cabinet’s Office of Procurement Services].” FAP 111-08-00(1) (emphasis added). Stated simply, the Finance and Administration Cabinet Secretary has adopted a regulation that foregoes preapproval for contracts “where no competition exists,” such as when a board or commission has the sole authority to appoint its executive leader. And, while the Finance and Administration Cabinet has general supervisory authority over contracts, such authority wanes when the contract is “made under general administrative regulations promulgated by the cabinet.” KRS 45A.045(2).

Having established that the contracts do not require preapproval from the Secretary, the questions that remain are when does the contract become valid and what role, if any, does the Secretary have in review.

A personal service contract becomes effective upon its filing with the Government Contract Review Committee of the Legislative Research Commission. *See* KRS 45A.695(1); 1 KAR 2:010, Section 2. Like all personal service contracts, the Government Contract Review Committee is empowered to review the contract and recommend “its disapproval or objection to the personal service contract[.]” KRS 45A.705(5); 1 KAR 2:010, Section 2(5). If disapproved, the Finance and Administration Cabinet Secretary may revise the contract, cancel it, or otherwise overrule the Committee’s disapproval. KRS 45A.705(6); 1 KAR 2:010, Section 6. This decision must be made within ten days. KRS 45A.705(7). Accordingly, the Finance and Administration Cabinet Secretary has a role in reviewing the contract of the State Fair Board’s President and CEO and the Department of Fish and Wildlife Resources Commissioner’s contract only if the Government Contract Review Committee first disapproves the contract. Otherwise, the Finance and

⁴ A “sole source” involves “a situation in which there is only one (1) known capable supplier of a commodity or service.” KRS 45A.095(1)(b).

Administration Cabinet Secretary has no role in the contract's review or approval because the Secretary has promulgated a policy, which is incorporated into an administrative regulation, providing that preapproval is not required for contracts where no competition exists.

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